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Person v. State Appellant's Brief Dckt. 34919

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IN THE SUPREME COURT OF THE STATE OF IDAHO

MARK A. PERSON,

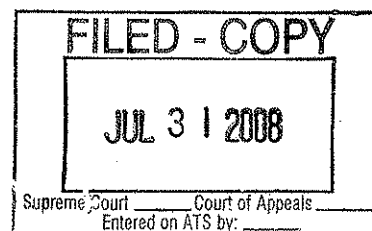
Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent-Respondent.

S.Ct. No. 34919



OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE JOEL HORTON
District Judge

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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the summary dismissal of Appellant Mark Person's petition for post-conviction relief. Clerk's Record (CR) 89.

B. Procedural History and Statement of Facts

Mark Person entered a conditional guilty plea to second degree murder on August 20, 2002. Following preparation of a presentence investigation report, Mr. Person was sentenced to a term of life with 20 years fixed. On direct appeal, the Court of Appeals held that portions of Mr. Person's statements to police detectives should have been suppressed pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Upon remand, Mr. Person entered a binding Rule 11 plea whereby it was stipulated that the presentence investigation would be waived and the sentence imposed would be 50 years with 15 fixed. That judgment was entered on September 12, 2005. *State v. Person*, 145 Idaho 293, 295, 178 P.3d 658, 660 (Ct. App. 2007), *rev. denied* (2008), *citing State v. Person*, 140 Idaho 934, 104 P.3d 976 (Ct. App. 2004).

After the second guilty plea and imposition of sentence, counsel filed a motion to correct a clerical mistake pursuant to ICR 32 and 36, seeking to have copies of the PSI returned from IDOC or redacted to exclude suppressed evidence. That motion was denied and a direct appeal taken. Relief was denied by the Court of Appeals in *State v. Person*, 145 Idaho 293, 178 P.3d 658. CR 7, *State v. Person*, *supra*.

On February 27, 2007, Mr. Person filed a *pro se* petition for post-conviction relief alleging ineffective assistance of counsel in the entrance of the Rule 11 plea resulting in an invalid plea. Mr. Person also alleged ineffective assistance of appellate counsel, who had

advised him that his appeal from the denial of the ICR 32 and 36 motion tolled the running of the time limits for the filing of a post-conviction petition. CR 5.

Counsel was appointed, as was a special prosecutor for the state. CR 27, 34.

The state then filed an answer to the petition offering among other defenses that the petition was time barred. The state asserted that the unappealed conviction was entered on September 9, 2005, that the one year time limit for filing a post-conviction petition thus began forty-two days later on October 21, 2005, and that therefore the petition filed in 2007 was untimely. CR 46.

The state followed the answer with a motion for summary dismissal and a brief in support thereof. CR 48, 53. The state also asked the Court to take judicial notice of the underlying criminal case. CR 50.

A hearing was held on the motion for summary dismissal. At the end of the hearing, the District Court summarily dismissed the petition because it was time barred. The Court specifically declined to address any of the issues raised in the petition or any of the other defenses offered by the state. Tr. 9/20/07 p. 12.

This appeal timely followed. CR 89.

III. ISSUE PRESENTED FOR REVIEW

Did the District Court commit fundamental error in dismissing the petition for post-conviction relief as time barred on the claim that counsel was ineffective in negotiating an unenforceable plea agreement when the claim was filed well within a year of when the ineffective assistance was and could have been reasonably discovered?

IV. ARGUMENT

The Petition was not Time Barred as it was Filed Within One Year of the Time When the Claim of Ineffective Assistance of Counsel Was and Could Have Reasonably Been Discovered.

Mr. Person's petition claims ineffective assistance of counsel in negotiating a plea agreement which could not be enforced because it required the District Court to do an act it had no power to do, specifically, to strike suppressed statements from the 2003 PSI. That claim could not have reasonably been discovered prior to attempts by counsel to enforce it, and the ultimate determination by the Court of Appeals, with the subsequent denial of review by the Supreme Court, that appellate relief was not available. Given Mr. Person's petition was filed within one year of the time he could have reasonably discovered the claim, his petition was not untimely and the District Court committed fundamental error in summarily dismissing the petition for violation of the statute of limitations.

The question of whether Mr. Person's petition was timely filed is a question of law over which the appellate court exercises free review. *Fox v. State*, 129 Idaho 881, 883, 934 P.2d 947, 949 (Ct. App. 1997). In this case, the argument that the petition was not untimely because it was filed within a year of when the ineffective assistance of counsel was and could reasonably have been discovered was not raised before the District Court. Therefore, fundamental error is asserted. Fundamental error is an error which so profoundly distorts the process that it produces manifest injustice and deprives the accused of the fundamental right to due process. *State v. Anderson*, 144 Idaho 743, 748, 170 P.3d 886, 891 (2007). The fundamental error doctrine applies in appeals from summary dismissal of post-conviction petitions. *Gonzales v. State*, 120 Idaho 759, 762, 718 P.2d 1159, 1161 (Ct. App. 1991).

I.C. § 19-4902(a) provides that a petition for post-conviction review may be filed within one year of the time from the expiration of the time for appeal, or from the determination of an appeal, or from the determination of a proceeding following an appeal, whichever is later. However, the limitations period may be tolled when the petitioner has effectively been denied access to the courts. *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003). For example, an equitable tolling of the statute of limitations has been found where the petitioner was incarcerated in an out-of-state facility on an in-state conviction without legal representation or access to Idaho legal materials, and where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from earlier pursuing challenges to the conviction. *Sayas v. State, supra, citing Isaak v. State*, 132 Idaho 369, 370 n. 1, 972 P.2d 1097, 1098 n. 1 (Ct. App. 1999).

Likewise, there is a reasonable discovery exception to the statute of limitations. *Fox v. State, supra*, is instructive. In *Fox*, the dispositive question was whether Fox's petition was timely filed. At the time of Fox's conviction, I.C. § 19-4902 provided a five year statute of limitation. However, in 1993, the statute was amended to provide a one-year statute of limitation. The district court determined Fox had one year after the amendment of the statute to file and dismissed his petition because it was filed one year and six months after the amendment.

The Court of Appeals agreed with the dismissal with the exception of Fox's claim relating to ineffective assistance of counsel in a Rule 35 proceeding. His petition was filed within one year of the expiration of the time for appeal of the Rule 35 motion and therefore was not untimely. This result demonstrates that there is a discovery exception to the one-year statute of limitations. The time for filing a post-conviction relative to claims arising from the Rule 35

motion began to run only upon the expiration of the time to appeal the Rule 35 motion. In other words, the statute began to run on the Rule 35 claims only when they were or reasonably could have been discovered. *See also, Lake v. State*, 124 Idaho 259, 858 P.2d 798 (Ct. App. 1993), holding that an application for post-conviction relief claiming ineffective assistance of counsel in a probation revocation proceeding was timely even though filed more than five years after the conviction, where the application was filed within five years of the probation revocation proceeding. *See also, Gonzalez v. State*, 139 Idaho 384, 386, 79 P.3d 743, 745 (Ct. App. 2003) (“ . . . any post-conviction action filed within the limitations period connected to the probation revocation order, but beyond the limitations period measured from the appeal period for the judgment of conviction may address only issues that arose from the probation revocation proceeding.”)

Fox also recognized the reasonable discovery exception in its analysis of *Fox*’s claim that his petition should not be held untimely because he was raising claims that were only first recognized in *Browning v. Vernon*, 44 F.3d 818 (9th Cir. 1995), which would have enlarged the statute of limitations period to one year after the *Browning* decision became final. The Court of Appeals rejected this argument. However, the Court did not reject it because there is no reasonable discovery exception to the statute of limitations, but rather because the claims *Fox* intended to raise had been recognized long before *Browning*, in *State v. Wolfe*, 99 Idaho 382, 582 P.2d 728 (1978). *See also, John v. State*, 129 Idaho 304, 923 P.2d 1011 (Ct. App. 1996). Instead of rejecting a reasonable discovery exception, *Fox* and *John* treat such an exception as a given:

In this case, Mr. Person makes the following claim in his petition:

When Person agreed to enter his plea of guilty it was with the specific

understanding that no PSI would be made part of the sentencing process. This was an important condition to Person, since the 2003 PSI contained statements which the appellate court had determined required suppression. And, the inclusion of those unredacted remarks would almost certainly impact his classification within the prison system and his chances for parole. Absent this condition, it is highly unlikely Person would have entered into the plea bargain.

Person's attorneys of record knew this condition was key to his entering into a Rule 11 plea agreement and have said so, in open court, at the oral argument hearing on the motion to correct a clerical error.

Accordingly the conduct of Person's attorneys constitutes ineffective assistance of counsel for either allowing Person to plead to conditions other than what they had informed him were an intrinsic part of the bargain or their failure to recognize that such a condition was beyond the power of district court to grant.

CR 8.

This claim of ineffective assistance of counsel could not have been reasonably discovered until Mr. Person found out that the 2003 PSI had not been redacted or taken out of his prison record and then discovered through the failure of the motions and subsequent appeal to correct the problem that removal of the offending material in the PSI was not part of the plea bargain and/or not something within the power of the district court to effect. It was not clearly known that the 2003 PSI could not be redacted or taken out of his prison record by the District Court until the resolution of the appeal on this question. The appeal decision was not filed until October 31, 2007. Therefore, Mr. Person's petition for post-conviction relief, filed on March 1, 2007, was not untimely. Compare, *Evensiosky v. State*, 136 Idaho 189, 191, 30 P.3d 967, 969 (2001) (discovery exception would not apply to claim discovered "well before [the] time for filing expired.")

The error in summarily dismissing the petition was a fundamental error because it produced a manifest injustice and denied Mark Person the fundamental right to due process.

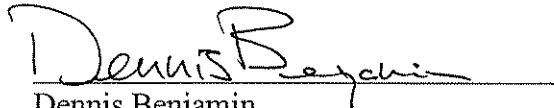
State v. Anderson, supra. In wrongly denying Mr. Person a forum to raise his claims of ineffective assistance, the District Court denied him the most basic element of due process, entry into the courtroom. Therefore, even though the argument raised here was not raised below, this Court should now correct the manifest injustice by reversing the order summarily dismissing the petition as time barred.

The District Court committed fundamental error in not applying the reasonable discovery rule to Mr. Person's claim of ineffective assistance of counsel. As his petition was not untimely under the reasonable discovery rule, the order of summary dismissal should now be reversed and the matter remanded for an evidentiary hearing.

V. CONCLUSION

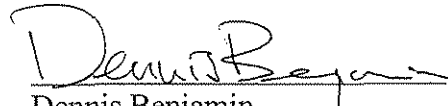
Mr. Person's petition for post-conviction relief was not time barred as it was filed well within a year of the time he could have reasonably discovered the ineffective assistance of trial counsel in negotiating a plea agreement outside of the scope of the District Court's power of compliance. He therefore asks that this Court reverse the order summarily dismissing his petition as time barred and remand for an evidentiary hearing on the merits of the petition.

Respectfully submitted this 31st day of July, 2008.


Dennis Benjamin
Attorney for Appellant Mark Person

CERTIFICATE OF SERVICE

I, Dennis Benjamin, hereby certify that on this 3rd day of July, 2008, I deposited two true copies of the foregoing brief in the United States mail, postage prepaid, addressed to: Office of the Idaho State Attorney General, Criminal Law Division, P.O. Box 83720, Boise, ID 83720-0010.


Dennis Benjamin